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No. 90-304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CENTENNIAL SCHOOL DISTRICT and RONALD Y. WHITE, in his official capacity as Supervisor of Secondary Education for the Centennial School District,

Petitioners,

v.

HARRY GREGOIRE; DAVID URBANY; SCOTT IRWIN; HERMAN DIETSCH; RICH MILLER; and CAMPUS CRUSADE FOR CHRIST, INC.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Does a school district that generally opens its facilities to outside groups after school hours but prohibits access to religious groups because of the content of their speech violate the First Amendment?

Do public school districts have unlimited power to create any arbitrary limitations on group access to limited open forums?

May a school district ban all distribution of any religious literature in a public school, even during non-school hours by people attending permitted meetings by outside groups?

Does the Constitution, which requires "religious speech" in open forums, also require public schools to ban "religious worship" from its open forums?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

The Third Circuit correctly found that the Centennial School District (hereinafter, "Centennial") unconstitutionally excluded religious groups from Centennial's open forum for community groups. The Third Circuit also declared unconstitutional Centennial's blanket ban on any distribution of religious literature (only) at any time at Centennial school buildings, even during open forum times.

Centennial School District has a specific policy that opens its facilities to community groups for expressive activities. Harry Gregoire, the suburban Philadelphia director of Student Venture, sought to rent the high school auditorium in the Centennial School District for a Saturday night performance by Andre Kole, an illusionist/evangelist from Campus Crusade for Christ. Student Venture is the high school wing of Campus Crusade for Christ, a conservative evangelical Christian organization. Centennial refused to rent a high school auditorium to Student Venture because of the religious content at the end of the illusionist performance.

At the time this controversy arose in October, 1987, Centennial had an official policy on "Facility Use" which encouraged the use of the facilities by resident students and community groups, but expressly forbade use of school facilities for religious purposes. Section B.17 of the Facilities Use Policy read:

> Pennsylvania law specifically prohibits the use of school facilities for religious services, instruction and/or activities.

Student Venture brought an action in the U.S. District Court for the Eastern District of Pennsylvania under 42 U.S.C. § 1983 for injunctive and declaratory relief against Centennial School District and Ronald Y. White, Supervisor of Secondary Education for Centennial. The court granted Student Venture's motion and issued a preliminary injunction. 674 F.Supp. 172 (E.D.Pa. 1987). Centennial appealed the preliminary injunction to the United States Court of Appeals for the Third Circuit and the court, without opinion, upheld the preliminary injunction. 853 F.2d 917, 918 (3rd Cir. 1988).

Centennial's New Policy and Continued Open Forum

After the District Court granted Student Venture's preliminary injunction, and before the Third Circuit affirmed the decision, Centennial changed its Facility Use policy, but the changes were merely cosmetic. Centennial's new policy still

creates an open forum by permitting all types of groups to use the facilities[1] while continuing to place content-based prohibitions on religious speech in violation of the Constitution.

The new policy, like the old policy, expressly contains content-based exclusions against religious speech. Oddly enough, Centennial goes even further in the new policy to preclude religious speech by adding new exclusions prohibiting the use of the facilities for religious services and prohibiting the distribution of all religious literature in its facilities at any time. The new policy states, in pertinent part:[2]

> c. In any event, religious services (defined to include the invocation of, worship to, prayer to, or adoration of a diety [sic]) is prohibited.
>
> d. The sale or distribution of Bibles, testaments, scriptures or religious literature is prohibited.

---

[1] Centennial allows various groups to use its facilities including (cert pet. at 5-6):

> Centennial resident civic, cultural and service organizations having a majority of Centennial resident membership and/or an on-going connection with the Centennial community.
>
> a. Civic: Centennial neighborhood associations organized for the purpose of discussion of neighborhood affairs.
>
> b. Cultural: Centennial resident music, artistic, player associations organized for the purpose of rehearsal, performance of music compositions, plays or art displays.
>
> c. Centennial Resident Service Organizations: Rotary, Kiwanis, Lions, Jr. Chamber of Commerce and like nonsectarian service organizations.

The new policy also permits school facilities to be used by:

1. Community based employee associations and labor unions (limited to members only) for meetings only.

2. Commercial profit making ventures which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences.

[2] Cert. pet. at 6.

The District Court granted Student Venture's motion to amend its complaint to challenge the new policy under the facial overbreadth doctrine and on November 30, 1988, the District Court issued a permanent injunction, ruling that the new policy still created an open forum, with content-based exclusions of religious speech. 701 F.Supp. 103 (E.D.Pa. 1988).

On June 22, 1990, United States Court of Appeals for the Third Circuit affirmed the District Court's grant of a permanent injunction against Centennial. Further, the Third Circuit agreed that Centennial's policy unconstitutionally banned "religious worship" from its open forum, and unconstitutionally prohibited any distribution of religious literature. The Third Circuit instructed the District Court to issue a revised, expanded injunction against Centennial's ban on religious worship in the open forum and the prohibition on distribution of religious materials. 907 F.2d 1366 (3rd Cir. 1990). Centennial School District has appealed that decision of the Third Circuit to this Court.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY APPLIED SUPREME COURT "OPEN FORUM" PRECEDENT

This Court should deny cert in this case because the Third Circuit correctly followed the principles of open forum law expressed by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and *Board of Education of the Westside Community Schools* v. *Mergens*, 495 U.S. ____, 110 L.Ed.2d 191 (1990). The Third Circuit correctly ruled that Centennial maintains an open forum by policy, and properly rejected Centennial's content-based exclusions against religious speech.

This case is governed by and progresses naturally from this Court's decisions in *Widmar* and *Mergens*. In *Mergens* this Court held that a public high school which allowed non-curriculum related student groups to use the facilities must also allow

religious student groups to use the facilities.[3] In *Widmar*, this Court found that a state university which generally allowed student groups to use its facilities could not constitutionally ban student religious groups from meeting on campus. The present case deals with a public high school which generally allows outside groups to use its facilities during non-school hours yet prohibits religious groups from using the facilities during non-school hours solely because of the content of their speech.

Centennial engages in content-based discrimination against religious speech under its policy. The school district attempts to hide that fact by claiming its schools are not open to the "general public," but are only open for specifically designated "groups" and "activities." As the Third Circuit correctly said, the policy language attempts to "gerrymander" the open forum to exclude religious groups, *see Gregoire* v. *Centennial School District*, 907 F.2d ____, (3rd Cir. 1990) (cert. pet. at 19a), but the terminology does not alter the constitutional reality, and the gerrymandering is not disguised.

A. Centennial Has Created An Open Forum.

Centennial's policy explicitly opens its public property for use by outside groups, which is the main hallmark of a government-created open forum. In *Perry Education Association* v. *Perry Local Educator's Association*, 460 U.S. 37 (1983), this Court said an open forum is one "generally open to the public, even if it were not required to create the forum in the first place." *Id.* at 45.

Also, this Court has clearly ruled that public schools can be open forums, and are subject to the constitutional principles spelled out in *Perry* and *Widmar*. In *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), this Court said:

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[3] While this case does not deal with the Equal Access Act, this Court's analysis in *Mergens* is analogous and helpful in this context.

> Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities for "indiscriminate use by the general public," *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983), or by some segment of the public, such as student organizations. *Id.* at 46, n.7 (citing *Widmar* v. *Vincent*).

484 U.S. at 267. There is nothing inherent about public schools that exempts them from the rigors of the First Amendment, and allows public schools to engage in content-based exclusions against religious speech from their open forums.

The Centennial policy allows the following broad range of outside groups to use school facilities:

> Centennial resident civic, cultural and service organizations having a majority of Centennial resident membership and/or an on-going connection with the Centennial community.
>
> a. Civic: Centennial neighborhood associations organized for the purpose of discussion of neighborhood affairs.
>
> b. Cultural: Centennial resident music, artistic, player associations organized for the purpose of rehearsal, performance of music compositions, plays or art displays.
>
> c. Centennial Resident Service Organizations: Rotary, Kiwanis, Lions, Jr. Chamber of Commerce and like non-sectarian service organizations.

Cert. pet. at 5-6.

The policy also permits school facilities to be used by "community based employee associations and labor unions (limited to members only) for meetings only" and "commercial profit making ventures which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences." *Id.*

Centennial guarantees these groups free expression while they are using Centennial facilities. Centennial promises, "free

expression within the limits of the specific groups and activities authorized." Also, Centennial guarantees freedom of expression in its adult education classes. Centennial says that "the use of assigned *classroom* space within the Evening School is intended to reasonably accommodate 'open forum' requests."

After evaluating this policy, the Third Circuit correctly found that Centennial created a designated open forum and engaged in content based discrimination.

> While it disavows an intent to create an open forum Centennial has, in reality, opened its doors to those groups substantially outside what is commonly thought of as the educational mission of the school and has gerrymandered Student Venture out of Centennial facilities solely on the basis of the religious content of its program.

Gregoire, 907 F.2d at ____, (cert. pet. at 19a).

B. Centennial Bans Religious Speech From Its Open Forum.

Amidst all this free expression, Centennial slams the door on all religious speech. In addition to the policy sections which expressly prohibit use of the facilities for religious services, (§ II.C.1.c.),[4] and the "sale or distribution of Bibles, testaments, scriptures or religious literature," (§ II.C.1.d.),[5] Centennial catches all other religiouis groups which might otherwise qualify under the policy, in two other sections.

In § I.A.4., Centennial allows civic, cultural and service groups to use the school facilities at no cost. Yet Centennial requires that the service groups must be "*non-sectarian.*"[6]

The policy also covertly guarantees that Student Venture could never again have a performance by Andre Kole in the Centennial open forum. Under § I.C. which lists the groups

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[4] Cert. Pet. at 6.

[5] *Id.*

[6] *Id.*

which will be charged for the use of the facilities, Centennial allows "commercial *profit making ventures* which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences."[7] Religious groups, most if not all being non-profit, are thereby precluded from using Centennial facilities at any cost.

Centennial's disingenuous gerrymandering of the forum effectively cuts out religious groups and only religious groups from using its facilities, and as this Court has said, "[w]here the State has opened a forum for direct citizen involvement, exclusions bear a heavy burden of justification," *Widmar* v. *Vincent*, 454 U.S. at 268.

C. The Court Of Appeals' "Limited Forum" Analysis Is Correct.

Centennial attempts to avoid the constitutional principles governing open forums, by defining itself as a "limited open forum," but distorting the "limited open forum" concept so that it retains total power to exclude groups based on their content. Essentially, Centennial argues that any content-based "limitation" it chooses to impose is constitutionally permitted, because Centennial operates a "limited open forum." Centennial masquerades its content-based exclusions as legitimate "limitations" for a "limited open forum," and goes far beyond what this Court has said about limited open forums.

The Third Circuit swiftly rejected Centennial's misuse of the "limited open forum" doctrine, and exposed the inherent bias in the school district's argument that it operates a limited open forum:

> The definition of groups falling within the "educational mission of the school" is so vague that Centennial has virtually unlimited discretion in deciding which groups qualify and which do not. The term "civic" can be stretched or contracted to fit whatever the school district decides.

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[7] *Id.*

Gregoire, 907 F.2d at ____ (cert. pet. at 18a). As the Third Circuit points out, Centennial has already inconsistently applied its forum "limitations" so that they function as content-based exclusions.

> While it stresses the need for religious and political neutrality, Centennial has opened its evening program to religious discussion and has granted access to politically active groups, such as neighborhood association, labor unions and civic organizations such as the Rotary. Centennial has also opened its doors to dramatic and musical performances by commercial profitmaking ventures. These performances are not required to relate to school or civic purposes. Civic organizations, which have taken stands on politically divisive issues, are also permitted to meet at the high school.

Id.

This Court recognized the same problem in *Mergens* where the school district argued that it had the power to determine what was "curriculum related" thereby controlling the application of the Equal Access Act.

> Allowing such a broad interpretation of "curriculum-related" would make the [Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content.

Mergens, 495 U.S. at ____, 110 L.Ed.2d at 212.

To allow Centennial to determine what is and what is not within the "educational mission of the school" would be untenable. Unlike the university and school district in *Widmar* and *Mergens* which argued that they were compelled by the Establishment Clause to preclude facilities use by religious groups, Centennial simply does not want religious speech in its facilities.

Centennial's idea of a limited forum is chilling in light of the history of the First Amendment and this Court's interpretation of the Free Speech Clause. It is especially chilling in light of the School District's stated desire that its schools are to be "an island of pluralistic tolerance and neutrality."[8]

Rather than submit to First Amendment requirements for open forums, Centennial threatens to shut its doors in order to avoid allowing religious and political groups access to school facilities after hours:

> Certainly every school district in the country need not close its auditoriums, athletic fields, classrooms, cafeterias, and other facilities to the Cub Scouts, Brownies, Kiwanis, Lions and local adult education groups, in order to avoid opening itself up to a first-come-first-serve open forum policy in which fractious political and religious speech of every kind must be permitted.

Cert. pet. at 27.[9]

Centennial's puzzling policy of tolerance by intolerance and neutrality by discrimination is an affront to the First Amendment. Centennial wants free speech, but does not want anything it deems as "fractious" speech. But controversy and debate flow from free speech. As this Court has said:

> [A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocation and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance.

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[8] Cert. pet. at 16.

[9] There has been no evidence that the Andre Kole performance was in any way "fractious." The performance occurred on the evening of October 31, 1987. It was attended by about 300 community members, students and others. Kole gave an evangelism message at the end of the performance. There was no disruption or harm to school property.

Terminiello v. *Chicago*, 337 U.S. 1, 4 (1949). Allowing Centennial to define a limited forum by the content of the speech rather than other legitimate means, violates the Free Speech Clause and condones an unacceptable message of intolerance.

D. Religious Worship Is Protected Speech Under The First Amendment.

In the District Court's two opinions granting the preliminary injunction and later, the permanent injunction, the District Court drew a strange distinction that "religious speech" is permitted in an open forum, but not "religious worship." 674 F.Supp. at 179; 701 F.Supp. at 107.

Centennial used this erroneous distinction of law when it drafted its new policy (after the preliminary injunction had been handed down, but before the ruling on the permanent injunction). Centennial prohibits religious services, including religious worship, under its facility use policy.

> c. In any event, religious services (defined to include the invocation of, worship service to, prayer to, or adoration of a diety [sic]) is prohibited.

Cert. pet. at 6.

After the District Court issued the permanent injunction, it again stated that "religious speech" must be allowed in an open forum, but that the Constitution required "religious worship" to be banned from an open forum. Student Venture cross-appealed this point of law, saying that the Constitution does not draw any difference between "religious speech" and "religious worship" for open forum purposes. Student Venture referred to this Court's pronouncements in *Widmar* that religious worship was fully protected under the Free Speech Clause in an open forum setting. 454 U.S. at 269, n.6.

The Third Circuit agreed, and struck down Centennial's specific ban on religious worship in the open forum. The Third Circuit, citing *Widmar*, correctly held that "religious discussion and religious worship constitute speech protected by the

first amendment." *Gregoire*, 907 F.2d at ____, (cert. pet. at 36a).

The Third Circuit correctly applied the principles that this Court's held in *Widmar*. *Widmar* reaffirmed what this Court had said in earlier cases, that the Free Speech Clause protects both religious speech and religious worship. *See, e.g., Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) and *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

The Third Circuit was correct in holding that the District Court's injunction was too narrow and appropriately instructed the court to revise the injunction to prohibit Centennial from banning religious worship in its open forum.

E. Centennial's Complete Ban On The Distribution Of All Religious Literature Is Unconstitutional.

The Third Circuit also instructed the District Court to revise its injunction to prohibit Centennial's complete ban on the distribution of all religious literature. Centennial's policy states that:

> d. The sale or distribution of Bibles, testaments, scriptures or religious literature is prohibited.

Cert. pet. at 6.

The Third Circuit noted that "the right of free speech encompasses the right to distribute literature."[10] The Third Circuit correctly ordered the District Court to expand the permanent injunction to include the ban on distribution of religious literature in the injunction.

The total ban on the distribution of religious literature swept too far, and eliminated constitutionally-protected literature in

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[10] Cert. pet. at 37a (quoting *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Gillette* v. *U.S.*, 401 U.S. 437, 462 (1971); *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111-12 (1943)).

its parameters. For example, people attending an open forum meeting at the high school after school hours could not distribute religious literature to others at the meeting, directly contradicting what this Court has said in such cases as *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

If the Third Circuit had affirmed the District Court's injunction without adding the ban on literature distribution, then it would have produced an inconsistent result. Centennial's policy would have permitted people to talk about religion in the Centennial open forum (under the *Gregoire* injunction), but they could not distribute any literature about religion at those same meetings.

Also, the policy could be read to mean that a student could not hand a religious booklet to a friend in the public school. This would violate the students' free speech rights.[11] Such situations make that portion of the policy unconstitutional and the Third Circuit was correct in including the ban on distribution in its order.

II. THE LOWER COURTS ARE CORRECTLY APPLYING THE CURRENT SUPREME COURT PRECEDENT

Centennial, in its cert petition, makes it appear that the Third Circuit wrote an aberrant decision out of step with the other federal circuits and district courts. In reality, the Third Circuit's opinion reflects the new trend set by this Court in *Mergens* and *Widmar*, which is also being followed by other lower courts.

A. Lower Courts Are Following This Court's Precedent In *Widmar* v. *Vincent* And *Board Of Education* v. *Mergens*.

In recent years, the current trend among the lower courts has been to hold that public school facilities can become open

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[11] *See Thompson* v. *Waynesboro Area School District*, 673 F.Supp. 1379 (M.D.Pa. 1987) *affirmed by an equally divided court*, (No. 88-5235, 3rd Cir., May 31, 1989) and *Rivera* v. *East Otero School District R-1*, 721 F.Supp. 1189 (D.Colo. 1989).

public forums even for religious speech. The lower courts have applied the principles of *Widmar*, *Mergens* and *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), where this Court found that high school facilities can be public forums. *Id.* at 267. Public schools, simply because they are public schools, are not exempt from the Constitution's prohibition against content-based exclusions from an open forum.[12]

Many lower courts have ruled that public school open forums cannot exclude religious groups. Along with the Third Circuit in *Gregoire*, the Eighth Circuit in *Mergens* v. *Board of Education*, 867 F.2d 1076 (8th Cir. 1989) said that the First Amendment required a public school to allow a religious group to meet in the school's open forum. This Court reviewed and upheld the Eighth Circuit's decision in *Mergens*. Although this Court did not reach the Free Speech Clause grounds addressed by the Eighth Circuit in *Mergens*, this Court did not rule that the Eighth Circuit was wrong in saying that the First Amendment open forum principles applied in *Mergens*.[13]

The Second Circuit has also ruled that a public school cannot ban a church from meeting in its open forum in *Deeper Life Christian Fellowship, Inc.* v. *Board of Education*, 852 F.2d 676 (2nd Cir. 1988). Although the Second Circuit used reasoning at odds with this Court's pronouncements in *Widmar* and *Mer-*

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[12] *See also Knights of the Ku Klux Klan, Realm of Louisiana* v. *East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978); *National Socialist White People's Party* v. *Ringers*, 473 F.2d 1010 (4th Cir. 1973); *Clergy and Laity Concerned* v. *Chicago Board of Education*, 586 F.Supp. 1408 (N.D.Ill. 1984); and *Lawrence University Bicentennial Commission* v. *City of Appleton*, 409 F.Supp. 1319 (E.D.Wis. 1976).

[13] Also, the Fifth Circuit has ruled that under the principles of *Widmar*, a womens' prayer group cannot be excluded from an open forum at a public library. *Concerned Women for America* v. *Lafayette County and Oxford Public Library*, 883 F.2d 32 (5th Cir. 1989). The D.C. Circuit ruled that it did not violate the Establishment Clause for Pope John Paul II to conduct a Catholic Mass on the Capitol Mall in Washington, D.C. *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C.Cir. 1979).

gens, it did rule that a public school must allow a church to meet on school grounds.

In early July, 1990, the U.S. District Court for the Northern District of New York held that the Owego-Apalachin Central School District was an "open forum" for a Youth for Christ illusionist-evangelist who performs an act very similar to the one performed by Student Venture in the Centennial School District. That district court ruled that it violated both *Widmar* and *Mergens* for the public school to deny permission to the illusionist-evangelist to use the school's open forum. *See Toby Travis* v. *Owego-Apalachin School District*, (1990 WL 94196). This case currently is on appeal to the Second Circuit.

In *Country Hills Christian Church* v. *Unified School District 512*, 560 F.Supp. 1207, 1215 (D.Kan. 1983), that federal district court ruled that *Widmar* required a public school to allow a church to use its open forum. The court there rejected the notion that the open forum doctrine does not apply to public schools.

In *Bender* v. *Williamsport Area School District*, 563 F.Supp. 697 (M.D. Pa. 1983), the district court held that there was "nothing to preclude the application of *Widmar* in this, a high school, context." *Id.* at 707. The district court then ordered the public school to allow a student Bible study to meet during the student open forum time.

And in *Thompson* v. *Waynesboro Area School District*, 673 F.Supp. 1379 (M.D. Pa. 1987) *affirmed by an equally divided court*, (no. 88-5235, 3rd Cir. May 31, 1989) the district court found that the public high school was an open forum during the school day for student distribution of religious newspapers.

Contrary to what Centennial alleges, the current trend in the circuit courts and many district courts is that public schools can be open forums, and that religious groups cannot be excluded from them.[14]

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[14] Although many lower courts have ruled consistently with *Wid-*

B. Centennial Mischaracterizes The Current State Of The Law.

In attempting to claim that a conflict exists among the federal courts in the application of *Widmar* to public schools, Centennial cites a number of old cases from the Second, Third and Ninth Circuits. Centennial fails to inform this Court that most of those decisions have been specifically overturned or rendered obsolete by later decisions such as *Widmar* and *Mergens*.

Centennial cites two Third Circuit decisions, *Bender* v. *Williamsport Area School District*, 741 F.2d 538 (3rd Cir. 1984) and *Student Coalition for Peace* v. *Lower Merion School District*, 776 F.2d 431 (3rd Cir. 1985) for the proposition that high schools are not equivalent to colleges in open forum analysis and therefore *Widmar* does not apply to the case at bar.

It is interesting that Centennial cites old Third Circuit cases to claim that a new Third Circuit decision is wrong. Obviously, the Third Circuit is the master of its own precedents. The Third Circuit certainly views its ruling in *Gregoire* as its current word on open forum law. The Third Circuit views earlier decisions as distinguishable from or overruled by *Gregoire*.

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mar and *Mergens*, it should be noted that three district courts have refused to allow religious groups to use open forums in public schools. In *Wallace* v. *Washoe County School District*, 701 F.Supp. 187 (D.Nev. 1988), the district court refused to allow a church to meet regularly at the open forum of a public school. In *Lamb's Chapel* v. *Center Moriches School District*, 736 F.Supp. 1247 (E.D.N.Y. 1990), the district court refused to allow a church to rent a public school for five successive Wednesday nights to show a film series by Dr. James Dobson that had religious content. In *Grace Bible Fellowship* v. *Maine School Area District #5*, (D.Maine, No. 89-0275-B, December 11, 1989, unreported decision) the district court refused to grant a temporary restraining order to allow a church to have a evangelistic Christmas banquet for the community of Rockland, Maine at the high school open forum, because the district court said any church use of a public school always violates the Establishment Clause.

Also, Centennial is simply wrong in viewing these two cases as applicable to this case. In *Bender*, this Court vacated the Third Circuit's decision on a question of standing[15] and overruled the merits of that decision with *Mergens*, where this Court specifically held that allowing student Bible groups in high schools *does not* violate the Establishment Clause. Therefore, the Third Circuit's opinion in *Bender* no longer is good law.

Centennial cites the Third Circuit decision in *Student Coalition* for a proposition which the *Gregoire* court expressly said it did not stand for. The Third Circuit specifically distinguishes its holding in *Student Coalition* from the present case:

> We grounded our decision [in *Student Coalition*] on the facts of that case and found that the school board had not opened the property to public use so as to create a limited forum. *We did not take the position that a public forum could not be created in a secondary school, i.e., that a Widmar open forum could not exist in a secondary school facility.* Instead, we undertook the same forum analysis set forth here and, on different facts, with much more limited access, found that no public forum had been created.

Gregoire, 907 F.2d at ____, (cert. pet. at 25a) (emphasis added).

Next, Centennial cites two decisions (one from the Second Circuit and one from the Ninth Circuit) to show conflict among the circuits with the Third Circuit's ruling in this case. The cases are *Garnett* v. *Renton School District No. 403*, 874 F.2d 608 (9th Cir. 1989) and *Brandon* v. *Board of Education*, 635 F.2d 971 (2nd Cir. 1980).

The Ninth Circuit's decision in *Garnett* is no longer good law. On June 11, 1990, this Court vacated the Ninth Circuit's decision in *Garnett* and remanded the case for further consideration in light of *Mergens*. 496 U.S. ____, 110 L.Ed.2d 628 (1990).

This Court also, in effect, overruled the Second Circuit decision in *Brandon* with the *Mergens* decision. In *Mergens*,

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[15] 475 U.S. 534 (1986).

this Court noted that Congress passed the Equal Access Act "in response to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on School premises during non-instructional time." 110 L.Ed.2d at 208. One of those two cases listed was the Second Circuit's decision in *Brandon*.

Brandon said that it violated the Establishment Clause to allow student-led Bible studies to meet on a public school campus. This Court clearly rejected that notion in *Mergens* (110 L.Ed.2d at 214), so *Brandon* is no longer good law.

Also, Centennial wrestled one quotation out of context from *Nicholson* v. *Board of Education*, 682 F.2d 858 (9th Cir. 1982) for the proposition that *Widmar*'s open forum principles do not apply to public schools. The facts of *Nicholson* show that it is irrelevant to the present case. *Nicholson* involved the firing of a high school teacher who, as advisor of the school sponsored newspaper, did not abide by the pre-publication review process. *Nicholson* has no connection to the free speech/open forum discussion in the present case.

Centennial highlighted (out of context) one quotation from a footnote in *Nicholson* that said "different considerations govern application of the First Amendment on college campus than at lower level educational institutions," *id.* at 863 n.4. Here, the Ninth Circuit was footnoting the statement that "officials and teachers must be accorded wide latitude over decisions affecting the manner in which they educate students. *Id.* at 863.

The only arguable conflict among the circuits exists between the Third Circuit's *Gregoire* decision and the Second Circuit's decision in *Deeper Life Christian Fellowship, Inc.* v. *Board of Education*, 852 F.2d 676 (2nd Cir. 1988). In *Deeper Life*, the Second Circuit ruled that a public school could establish a proper "limited open forum" that allowed a wide range of civic groups, but excluded religious groups. This principle was rejected by the Third Circuit in *Gregoire*, and has no basis in any decision of this Court.

However, the Second Circuit in *Deeper Life* ruled in favor of the church use of the forum, because the evidence showed that the school district had allowed other religious groups to use the schools. The Second Circuit now has before it the appeal of *Toby Travis* v. *Owego-Apalachin School District*, (1990 WL 94196) (N.D.N.Y. 1990), in which the district court questioned the continuing vitality of *Deeper Life* in light of *Mergens*. The New York federal district court in *Travis* allowed a religious group to use the public school for an evangelistic performance by a Christian illusionist similar to Andre Kole in *Gregoire*.[16]

The permissible scope of what a school district can and must allow in the education of students is not and never has been at issue in this case. There is no issue of students or impressionable youth at all. It is simply a question of whether or not a school district which generally allows outside groups to use its facilities can prohibit other groups access to the facilities solely because of the religious content of their speech. The Third Circuit applying this Court's precedent, correctly said "No."

CONCLUSION

For the foregoing reasons, Student Venture respectfully requests that Centennial's Petition for Writ of Certiorari be denied, or, in the alternative, that this Court grant cert and affirm this ruling of the Third Circuit.

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Respectfully submitted,

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[16] Three federal district courts have refused to allow religious groups to use open forums in public schools. See footnote 14.